

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Review of EEO Compliance and Enforcement)	MB Docket No. 19-177
in Broadcast and Multichannel Video)	
Programming Industries)	

**COMMENTS OF ACA CONNECTS – AMERICA’S COMMUNICATIONS ASSOCIATION
ON THE NOTICE OF PROPOSED RULEMAKING**



I. INTRODUCTION AND SUMMARY

ACA Connects – America’s Communications Association (“ACA Connects”) hereby comments in response to the Notice of Proposed Rulemaking (“*NPRM*”) regarding improvements to equal employment opportunity (“EEO”) compliance and enforcement processes.¹ ACA Connects agrees with the Commission on “the important role . . . EEO rules play in encouraging a diverse and multi-talented workforce,” and has long supported Commission efforts to increase workplace diversity.² However, the Commission should ensure that any reforms it adopts in this proceeding do not unduly burden smaller cable entities and other multichannel video programming distributors (“MVPDs”), which lack the resources to

¹ *Review of EEO Compliance and Enforcement in Broad. and Multichannel Video Programming Indus.*, MB Docket No. 19-177, FCC 19-54 (June 21, 2019) (“*NPRM*”).

² *Equal Opportunity Audit and Enforcement Team Deployment*, Order, 33 FCC Rcd 7504, para. 1 (“*EEO Enforcement Bureau Order*”). See, e.g., Comments of the American Cable Association, MM Docket No. 98-204, 1 (Jan. 16, 2003) (supporting Commission proposals to increase workplace diversity in the cable industry) (“2003 ACA EEO Comments”); Reply Comments of the American Cable Association, MM Docket No. 98-204, 1 (May 29, 2002) (same) (“2002 ACA EEO Reply Comments”); Comments of the American Cable Association, MM Docket No. 98-204, 1 (Apr. 15, 2002) (same) (“2002 ACA EEO Comments”).

handle extensive regulatory requirements and which often represent the sole provider of vital communications services in rural and other underserved areas.³

First, the Commission should ensure that its recently-implemented shift of EEO compliance responsibilities from the Media Bureau to the Enforcement Bureau does not expand the scope of EEO enforcement and that protections for smaller MVPDs in Commission audits and investigations are preserved.⁴ Second, the Commission should refrain from adopting proposals offered in this proceeding that would impose onerous regulatory burdens on smaller MVPDs or that produce little concomitant benefit. Third, the Commission should consider proposals to reduce the regulatory burdens placed on smaller MVPDs. In particular, should the Commission find it appropriate to raise the employment unit threshold for applying the EEO outreach, recordkeeping, and reporting requirements to broadcast stations, it should do the same for MVPDs. Finally, the Commission should further streamline EEO compliance processes through increased reliance on publicly-available information and online filings.

II. THE COMMISSION SHOULD ENSURE EEO REFORMS DO NOT UNDULY BURDEN SMALLER MVPDS

This proceeding provides the Commission with the opportunity to both improve its EEO compliance and enforcement processes as well as further its efforts to “reduce unnecessary regulatory burdens that no longer serve the public interest.”⁵ Congress has consistently

³ ACA Connects’ membership comprises nearly 800 small- and medium-size independent operators providing video, broadband, and phone services to nearly 7 million households and businesses. See ACA Connects, “About ACA Connects,” available at <https://www.acaconnects.org/about/> (last accessed Sep. 19, 2019).

⁴ See *EEO Enforcement Bureau Order* at paras. 4-6.

⁵ *Elimination of Obligation to File Broad. Mid-Term Report (Form 397) Under Section 73.2080(f)(2), Modernization of Media Regulation Initiative*, MB Docket Nos. 18-23, 17-105, Report and Order, 34 FCC Rcd 668, para. 6 (2019) (eliminating requirement for broadcast stations to provide EEO-related information at the midway point of their license terms) (“*Form 397 Order*”); see *Petition for Rulemaking Seeking to Allow the Sole Use of Internet Sources for FCC EEO Recruitment Requirement*, MB Docket 61-410, Declaratory Ruling, 32 FCC Rcd 3685, para. 5 (2017) (allowing MVPDs and broadcasters to use online job postings as the sole

expressed concern with the ability of smaller cable entities to bear the costs of administrative obligations, and both the 1992 Cable Act as well as the 1996 Telecommunications Act include specific small cable provisions recognizing that concern.⁶ Similarly, the Commission has repeatedly acknowledged the importance of maintaining the viability of smaller cable entities and the need to provide regulatory relief to further this public interest.⁷ In particular, the Commission adopted exceptions to many of its EEO requirements for cable entity employment

recruitment tool for employment vacancies under the EEO rules) (“*Internet Recruitment Declaratory Ruling*”).

⁶ See 47 U.S.C. § 543(i) (stating that the Commission, when adopting cable-related regulations, “shall design such regulations to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers”); 47 U.S.C. § 543(m) (providing for greater deregulation for smaller cable systems).

⁷ For discussion of these efforts in the context of rate regulation, see *Modernization of Media Regulation Initiative, Revisions to Cable Television Rate Regulations, et al.*, MB Docket Nos. 17-105, 02-144, *et al.*, Further Notice of Proposed Rulemaking and Report and Order, 33 FCC Rcd 10549 (2018); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket Nos. 92-266, 93-215, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393 (1995). For discussion of these efforts in the context of leased access rules, see *Leased Commercial Access, Modernization of Media Regulation Initiative*, MB Docket Nos. 07-42, 17-105, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 19-52 (June 7, 2019); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Leased Commercial Access*, CS Docket No. 96-60, Second Report and Order and Second Order on Reconsideration of the First Report and Order, 12 FCC Rcd 5267 (1997). For discussion of these efforts in the context of recordkeeping obligations, see *Channel Lineup Requirements – Sections 76.1705 and 76.1700(a)(4), Modernization of Media Regulation Initiative*, MB Docket Nos. 18-92, 17-105, Report and Order, 34 FCC Rcd 2636 (2019); *Elec. Delivery of MVPD Commc’ns, Modernization of Media Regulation Initiative*, MB Docket Nos. 17-317, 17-105, Report and Order and Further Notice of Proposed Rulemaking, 33 FCC Rcd 11518 (2018); *FCC Form 325 Collection, Modernization of Media Regulation Initiative*, MB Docket Nos. 17-290, 17-105, Report and Order, 33 FCC Rcd 9252 (2018); *Amendment of Parts 74, 76 and 78 of the Commission’s Rules Regarding Maintenance of Copies of FCC Rules*, MB Docket Nos. 17-231, 17-105, Report and Order, 33 FCC Rcd 2425 (2018). For discussion of these efforts in the context of accessibility requirements, see *Accessibility of User Interfaces, and Video Programming Guides and Menus*, MB Docket No. 12-108, Memorandum Opinion and Order, 33 FCC Rcd 11049 (MB 2018). For discussion of these efforts in the context of Emergency Alert System compliance, see *Big Sandy Telecom Inc., Request for Waiver of Section 11.11(a) of the Commission’s Rules*, File No. EB-02-TS-094, Order, 17 FCC Rcd 11795 (EB 2002).

units with fewer than six people.⁸ As a result, while these units still must comply with the general EEO obligations to widely disseminate job vacancies and not discriminate in hiring decisions, they do not need to meet the significant outreach, recordkeeping, and reporting requirements imposed on larger entities.⁹

In this proceeding, the Commission can further reduce the administrative burdens smaller cable entities and other MVPDs face while ensuring robust EEO compliance in numerous ways. First, the Commission should ensure that the shift of EEO compliance responsibilities to the Enforcement Bureau does not expand the current scope of EEO enforcement actions. As the Commission observed when initiating the shift, “the EEO team in the Media Bureau has consistently been effective at overseeing compliance with and enforcing the EEO rules.”¹⁰ In addition, the Commission noted that the EEO team’s responsibilities would remain the same following the transition.¹¹ These statements show that the shift was meant to improve efficiency and consistency in Commission enforcement actions, not signal an expansion to the EEO team’s current ambit. The Commission therefore should monitor EEO team actions following the transition to avoid the ramp up in the severity of investigations and fines seen recently in other enforcement areas.¹²

⁸ See 47 C.F.R. § 76.75(i).

⁹ See 47 C.F.R. §§ 76.63, 76.75(b), 76.75(i).

¹⁰ *EEO Enforcement Bureau Order* at para. 4.

¹¹ See *id.* at para. 5, n. 11 (stating that the EEO team would “continue to perform its existing compliance reviews . . . , including periodic random audits, review of filings that broadcasters must submit to the Commission at the same time as their license renewal applications, and mid-term reviews” following the relocation to the Enforcement Bureau).

¹² See, e.g., *Adrian Abramovich, Mktg. Strategy Leaders, Inc., and Mktg. Leaders, Inc.*, File No. EB-TCD-15-00020488, Forfeiture Order, 33 FCC Rcd 4663 (2018) (imposing largest fine in Commission history); *Am. Broadband & Telecomms. Co., Jeffrey S. Ansted*, File No. EB-IHD-17-00023554, Notice of Apparent Liability for Forfeiture and Order, 33 FCC Rcd 10308 (2018) (proposing largest-ever fine associated with Universal Service Fund compliance).

Second, the Commission should ensure that the protections afforded to smaller cable entities and other MVPDs in Commission investigations and enforcement actions remain available following the EEO team transition. The costs associated with responding to even a limited Commission investigation can be significant – often involving substantial outlays of money, time, and administrative resources to collect and produce requested information as well as hire legal counsel. These costs can be especially detrimental to smaller MVPDs, diverting funds away from planned network expansions and upgrades. The Communications Act protects small entities by requiring the Commission to consider an MVPD’s ability to pay in enforcement actions.¹³ The Commission should ensure that these protections remain available as a bulwark against unduly harsh enforcement actions against smaller MVPDs least able to redirect resources to their defense.

Third, the Commission should refrain from adopting proposals offered in the record that would add to the compliance burdens already shouldered by smaller MVPDs. For example, the group of organizations labeled the EEO Supporters in the *NPRM* asks the Commission to address the effect of “word-of-mouth” recruiting by racially homogenous staff in hampering diversity efforts.¹⁴ ACA Connects recognizes that recruiting efforts primarily reliant on word-of-mouth are not conducive to increasing workplace diversity, but even the EEO Supporters concede that existing Commission rules may be sufficient to address this issue. Specifically, the EEO Supporters state that companies can demonstrate that they do not engage in

¹³ 47 C.F.R. § 1.80(b)(8). Moreover, federal law allows small businesses to seek the assistance of the Small Business Administration in resolving federal agency enforcement matters, including those involving the Commission. See 15 U.S.C. § 657; *Reminder to Small Businesses: SBA’s Office of the Nat’l Ombudsman is Available to Assist with Fed. Enforcement Matters*, Public Notice (Feb. 15, 2019), available at <https://docs.fcc.gov/public/attachments/DOC-356188A1.pdf> (last accessed Sep. 19, 2019).

¹⁴ See Comments of the EEO Supporters, MB Docket No. 18-23, *et al.*, 2-4 (Apr. 30, 2018) (“EEO Supporters Comments”). While the EEO Supporters’ proposals appear to be limited to the compliance obligations imposed on broadcast stations, ACA Connects provides its input in the event the Commission considers implementing similar reforms regarding MVPDs.

discriminatory hiring practices by showing “that they recruit primarily online and through other readily available methods such as providing notices to community groups that request them.”¹⁵ Commission rules already require MVPDs with six or more employees to provide full-time employment vacancy notifications upon request to any organization that distributes employment information or refers job seekers to employers.¹⁶ The Commission also has allowed all MVPDs to recruit exclusively through online job postings since 2017.¹⁷ Thus, it appears that compliance with current Commission rules would address many of the EEO Supporters’ concerns. ACA Connects supports efforts to combat unlawful discrimination, whether through word-of-mouth recruiting or other methods, but the Commission correctly provided MVPDs with the flexibility to use recruitment sources “sufficient in [their] reasonable, good faith judgment to widely disseminate information concerning [a] vacancy.”¹⁸ The Commission should safeguard this flexibility and avoid adopting unnecessarily prescriptive recruitment obligations in response to the EEO Supporters’ proposals.

The Commission also should not adopt the EEO Supporters’ request for a reevaluation of the EEO audit program “to ensure that auditors have sufficient information to verify that hiring decisions were made *after* the job postings were made, and not before-hand.”¹⁹ Once again, ACA Connects supports efforts to proscribe discriminatory employment practices, including through sham post-hoc hiring rationalizations, but the solutions to such practices already exist in the Commission’s EEO rules. In particular, the rules require cable entities to instruct personnel with hiring and promotional authority to consider minority and female candidates without

¹⁵ *Id.* at 3, n. 11.

¹⁶ 47 C.F.R. § 76.75(b)(1)(ii).

¹⁷ *Internet Recruitment Declaratory Ruling* at para. 5.

¹⁸ 47 C.F.R. § 76.75(b)(1)(i).

¹⁹ EEO Supporters Comments at 5 (emphasis in original).

discrimination.²⁰ The rules also require cable entities with six or more employees to implement initiatives every year as part a “positive continuing program of outreach,” such as participation in job fairs and events sponsored by community organizations.²¹ A cable entity’s compliance with the EEO rules and the sufficiency of its employment outreach efforts can be readily examined by the Commission through the existing audit process. Such audits request voluminous documentation providing detailed recruitment and hiring data that can reveal discriminatory practices in employment outreach and decision-making. The Commission also can bypass the periodic audit process and immediately initiate an investigation if it receives evidence of possible EEO violations, or even at random, to ensure compliance.²² The existing audit process therefore provides a robust mechanism to identify and address unlawful discrimination in hiring without the adoption of new rules that will only increase the burdens placed on smaller entities.²³

²⁰ 47 C.F.R. § 76.75(d).

²¹ 47 C.F.R. § 76.75(b)(2).

²² 47 C.F.R. § 76.77(d). As a result, there is no need to change current Commission EEO processes to increase the percentage of employment units audited each year, as proposed by the Multicultural Media, Telecom and Internet Council (“MMTC”). See Letter from Maurita Coley, President and CEO, MMTC, *et al.*, to Rosemary Harold, Chief, Enforcement Bureau, Federal Communications Commission, MB Docket 19-177, 3 (Sep. 3, 2019). First, MMTC provides no evidence to support its claim that the current audit process “provide[s] little incentive to comply with the rules.” *Id.* As discussed above, the significant amount of time and administrative resources needed to respond to an audit, even if an audit is unlikely, as well as the threat of future enforcement action as a result of an audit provides more than sufficient incentive to comply with the EEO rules. Second, MMTC fails to show that the benefits of increasing the number of random EEO audits, if any, would not be outweighed by the burdens placed on small entities from disruptive, indeterminate “on-site reviews.” *Id.* However, ACA Connects does not oppose Commission efforts to publicize its existing whistleblower and anti-retaliation rules and release other non-binding guidance on EEO requirements to improve industry compliance. *Id.* at 3-6. Such efforts can help increase industry knowledge of the EEO rules without imposing additional compliance burdens on smaller entities.

²³ ACA Connects takes no position on the EEO Supporters’ proposal concerning the publication of summary EEO data, which is closely related to issues raised in a separate proceeding pending with the Commission. See *Review of the Commission’s Broad. and Cable Equal Emp’t Opportunity Rules and Policies*, MM Docket No. 98-204, Third Report and Order and Fourth Notice of Proposed Rulemaking, 19 FCC Rcd 9973 (2004).

As the Commission reviews the record, it should consider proposals to reduce the regulatory burdens placed on smaller MVPDs. As an example, the Joint Broadcaster Commenters recommend reforming the exception for EEO recordkeeping and other compliance obligations to exclude those entities likely lacking significant human resources staff.²⁴ The Joint Broadcaster Commenters correctly note that providers are harmed when having to comply with complex “EEO paperwork and documentation that it is not staffed to handle,” particularly when “its larger competition has an HR department handling such record-keeping.”²⁵ Although the Joint Broadcaster Commenters couched their recommendation in terms of the EEO compliance obligations imposed on broadcast stations, the same rationale applies to extending the proposal to MVPDs and the Commission has long sought to ensure conformity between the two sets of rules.²⁶ Smaller cable entities and other MVPDs face financial and administrative resource constraints not confronted by larger providers.²⁷ Most ACA Connects members serve small subscriber bases located in rural markets. These MVPDs, like all of ACA Connects’ membership, must deal with the challenges of building, operating, and upgrading modern video, telecommunications, and broadband networks. EEO compliance obligations divert resources away from already lean budgets to meet these challenges.²⁸ Consequently, should the Commission find it appropriate to raise the employment unit threshold for applying the EEO

²⁴ Joint Comments of 82 Broadcast Station Licensees and Petition for Further Notice of Proposed Rulemaking, MB Docket No. 19-177, 7-10 (July 18, 2019).

²⁵ *Id.* at 11.

²⁶ See *Review of the Commission’s Broad. and Cable Equal Emp’t Opportunity Rules and Policies*, MM Docket No. 98-204, Second Report and Order and Third Notice of Proposed Rulemaking, 17 FCC Rcd 24018, para. 1 (2002) (amending the MVPD EEO rules “to conform them, as much as possible,” to the broadcast EEO rules).

²⁷ See 2002 ACA EEO Reply Comments at 2-3; 2002 ACA EEO Comments at 1-2.

²⁸ See 2003 ACA EEO Comments at 2.

outreach, recordkeeping, and reporting requirements to broadcast stations, it should do the same for MVPDs.²⁹

Finally, the Commission should further streamline EEO compliance processes through increased reliance on publicly-available information and online filings. As shown by the Commission's recent elimination of the Form 397, there is no reason to maintain legacy recordkeeping and reporting requirements when the underlying information is largely available from other sources.³⁰ Thus, the Commission should eliminate the duplicative requirements of Sections 76.1702(a) and 76.1702(b) of its rules, which both relate to the public availability of a cable entity's EEO materials. Section 76.1702(a) requires cable entities to place certain EEO materials in their online public inspection files maintained by the Commission, while Section 76.1702(b) requires them to post that same material on their websites.³¹ Having separate requirements for making EEO materials available in both the public inspection file and on a cable entity's website made sense when the public inspection file was a physical file located at the cable entity's office. But now that the public file is online, requiring substantially similar EEO information to be made available in two different places is unnecessary. To resolve this redundancy, the Commission should eliminate the requirement that cable entities post a link to their already publicly-available EEO materials on their websites.

The Commission also should take steps to permit cable entities to file their EEO audit responses through the Commission's website. The Commission generally accepts EEO audit responses by mail or email. However, the often voluminous amount of documentation requested in an EEO audit, combined with any necessary explanatory materials, often makes

²⁹ ACA Connects notes that all MVPD employment units, regardless of size, would still be required to comply with the general EEO obligations to widely disseminate job vacancies and not discriminate in hiring decisions. See 47 C.F.R. §§ 76.73, 76.75(b).

³⁰ *Form 397 Order* at para. 3.

³¹ 47 C.F.R. §§ 76.1702(a)-(b).

such submission methods impracticable. The Commission therefore should create a platform hosted on its website allowing for the bulk upload of materials responsive to EEO audits. This will save smaller cable entities valuable time in both the audit preparation and response process.

III. CONCLUSION

ACA Connects strongly supports the Commission's efforts to improve its EEO compliance and enforcement practices. However, the Commission should ensure that any EEO reforms it adopts do not impose unnecessary burdens on smaller cable entities and other MVPDs and instead consider proposals to further streamline the EEO compliance process.

Respectfully submitted,

By: 

Matthew M. Polka
President and Chief Executive Officer
ACA Connects – America's Communications
Association
Seven Parkway Center
Suite 755
Pittsburgh, PA 15220
(412) 922-8300

Thomas Cohen
J. Bradford Currier
Kelley Drye & Warren LLP
3050 K Street, NW
Washington, DC 20007
(202) 342-8518
Counsel to ACA Connects – America's
Communications Association

Ross J. Lieberman
Senior Vice President of Government Affairs
ACA Connects – America's Communications
Association
2415 39th Place, NW
Washington, DC 20007
(202) 494-5661

September 20, 2019